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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 TITO ODILON LOPEZ,  
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12 Petitioner,  
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14 v.  
15  
16 RANDY GROUNDS, Warden,  
17 Respondent.  
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CASE NO. 12-CV-01941-IEG (RBB)

**ORDER:**

**(1) ADOPTING REPORT AND  
RECOMMENDATION [Doc. No.  
16];**

**(2) GRANTING MOTION TO  
DISMISS PETITION FOR WRIT  
OF HABEAS CORPUS [Doc. No.  
10]; and**

**(3) DENYING CERTIFICATE OF  
APPEALABILITY.**

19 This matter is before the Court on the motion of Respondent Randy Grounds  
20 (“Respondent”) to dismiss petition for writ of habeas corpus [Doc. No. 10, Resp.’s  
21 Mot.], made in response to Petitioner Tito Odilon Lopez’s (“Lopez”) Petition for  
22 Writ of Habeas Corpus (“Petition”) [Doc. No. 1]. Respondent asserts that the  
23 Petition is barred by the one-year statute of limitations. [Doc. No. 10, Resp.’s Mot.  
24 at 2.] Magistrate Judge Ruben Brooks issued a Report and Recommendation (“R &  
25 R”) recommending that the Court dismiss the Petition as untimely. [Doc. No. 16, R  
26 & R.] Lopez subsequently filed an Objection to the R & R (“Objection”). [Doc.  
27 No. 17, Objection.]

28 Upon *de novo* review, the Court concludes Lopez did not file his Petition

1 within the statute of limitations, and is not entitled to statutory or equitable tolling.  
2 Accordingly, the Court **ADOPTS IN FULL** the R & R and **GRANTS**  
3 Respondent's motion to dismiss.

#### 4 **BACKGROUND**

5 The R & R contains an accurate summary of the proceedings in this case, and  
6 the Court fully adopts the Magistrate Judge's detailed background. [Doc. No. 16, R  
7 & R at 2-5.] In sum, Lopez was sentenced to thirty years, eight months to life  
8 following conviction by jury trial in San Diego County Superior Court of the  
9 following charges: (1) torture; (2) assault and battery; (3) kidnapping with infliction  
10 of permanent paralysis; (4) forcible rape; (5) forcible oral copulation with use of a  
11 deadly weapon; (6) assault by means of force likely to produce great bodily injury;  
12 (7) assault with a deadly weapon; (8) corporal injury to a spouse/roommate with use  
13 of a deadly weapon; (9) corporal injury to a spouse/roommate with infliction of  
14 permanent paralysis; (10) making a criminal threat; and (11) false imprisonment  
15 with use of a deadly weapon. [Id. at 2-3.]

16 On February 5, 2008, the California Court of Appeal for the Fourth District,  
17 Division One, modified the judgment on direct appeal by striking the false  
18 imprisonment charge and attendant enhancements on the ground that this charge  
19 was a lesser included offense of the kidnapping count, and otherwise affirmed the  
20 conviction. [Id. at 3.] The California Supreme Court denied Lopez's petition for  
21 direct review on May 14, 2008. [Id.] Lopez did not file for writ of certiorari with  
22 the United States Supreme Court. [Id. at 4.]

23 Lopez subsequently challenged his conviction collaterally in state court by  
24 filing a petition for writ of habeas corpus in the San Diego Superior Court which  
25 was denied on June 23, 2009. [Id.] Continuing his state court challenges, Lopez  
26 then filed a petition for writ of habeas corpus in the California Court of Appeal  
27 which was denied on September 23, 2009. [Id.] Finally, on April 14, 2010, the  
28 Supreme Court of California denied Lopez's last petition for writ of habeas corpus

1 filed in state court. [Id. at 4-5.]

2 On August 5, 2012, Lopez filed the instant Petition for Writ of Habeas  
3 Corpus in this Court,<sup>1</sup> which Respondent now moves to dismiss as untimely. [Doc.  
4 No. 10, Resp.’s Mot.] On June 6, 2013, Magistrate Judge Brooks issued a R & R  
5 recommending that the Court dismiss the Petition as untimely. [Doc. No. 16, R &  
6 R.] Lopez subsequently filed an Objection to the R & R in which he argues that the  
7 statutory period should be tolled based on his inability to timely file as a result of  
8 his lack of English language skills and his low intelligence quotient. [Doc. No. 17,  
9 Objection at 1-2.]

### 10 LEGAL STANDARD

11 The duties of the district court in connection with a magistrate judge’s R & R  
12 are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §  
13 636(b)(1). The district court “must make a de novo review determination of those  
14 portions of the report . . . to which objection is made,” and “may accept, reject, or  
15 modify, in whole or in part, the findings or recommendations made by the  
16 magistrate.” 28 U.S.C. § 636(b)(1)(C); see also United States v. Raddatz, 447 U.S.  
17 667, 676 (1980); United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989).

### 18 DISCUSSION

#### 19 **I. Statute of Limitations**

20 The R & R provides the correct legal standard the Court must apply to  
21 determine whether Lopez’s Petition is time barred. Per the Antiterrorism and  
22 Effective Death Penalty Act (“AEDPA”), federal habeas petitions are governed by a  
23 one-year period of limitation, which begins to run from the date on which judgment  
24 became final by the conclusion of direct review. 28 U.S.C. § 2244(d)(1). Dismissal  
25 with prejudice is appropriate for a federal petition filed after the expiration of this

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27 <sup>1</sup> The Court adopts the R & R’s application of the mailbox rule. [Doc. No. 16,  
28 R & R at 5 n. 4.] Accordingly, although the Petition was filed on August 6, 2012, the  
Court considers the Petition filed on the date of Lopez’s signature, August 5, 2012.

1 one-year period of limitation. Jiminez v. Rice, 276 F.3d 478, 483 (9th Cir. 2001).

2 The R & R correctly concludes that Lopez's conviction became final after the  
3 expiration of his opportunity to file a petition for writ of certiorari with the United  
4 States Supreme Court. Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999).  
5 Accordingly, Lopez's conviction became final on August 12, 2008,<sup>2</sup> ninety days  
6 after the California Supreme Court's denial of discretionary review on May 14,  
7 2008. U.S. Sup. Ct. R. 13 (setting the limit for timely filing a writ of certiorari with  
8 the United States Supreme Court as ninety days after entry of a judgment by a state  
9 court of last resort). Therefore, the one-year statute of limitation period began the  
10 following day, on August 13, 2008, and expired on August 13, 2009. See Shelby v.  
11 Bartlett, 391 F. 3d 1061, 1066 (9th Cir. 2004). Lopez did not constructively file his  
12 Petition until August 5, 2012 when he delivered it to prison authorities. See  
13 Houston v. Lack, 487 U.S. 266, 276 (1988). Because this date was nearly thirty-six<sup>3</sup>  
14 months after the expiration of this period, the Petition is untimely. Thus, absent a  
15 showing that either statutory or equitable tolling should apply, Lopez's Petition is  
16 time barred.

#### 17 **A. Statutory Tolling**

18 The one-year limitations period for habeas petitions is statutorily tolled when  
19 a properly filed petition for habeas relief is pending in state court. 28 U.S.C. §  
20 2244(d)(2). Given the lack of information regarding the exact filing date of Lopez's  
21 state court habeas petition [Doc. No. 16, R & R at 11; Doc. No. 10, Resp.'s Mot. at  
22 5], the R & R appropriately analyzes the statutory tolling issue assuming the widest  
23 possible latitude and finds, even under such circumstances, the Petition is still

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25 <sup>2</sup>The R & R, while reaching the correct conclusion, erroneously calculates this  
26 ninety-day period as ending on August 14, 2008. [Doc. No. 16, R & R, at 9.] The  
Court adopts the correct calculation of August 12, 2008 as noted above.

27 <sup>3</sup> The R & R, again reaching the correct conclusion, erroneously states that this  
28 intervening period was "almost twenty-eight months." [Doc. No. 16, R & R, at 10.]  
The Court adopts the correct calculation of almost thirty-six months as noted above.

1 untimely. [Doc. No. 16, R & R at 11.] Even if statutory tolling applied until the  
2 day after Lopez's state collateral review became final, April 15, 2010, this Petition  
3 falls well outside the one-year statutory period ending on April 15, 2011, because  
4 Lopez filed the instant federal Petition on August 5, 2012. [Id. at 12.] Accordingly,  
5 the Court **ADOPTS** the R & R's recommendation and concludes that Lopez is not  
6 entitled to statutory tolling.

### 7 **B. Equitable Tolling**

8 The R & R properly sets forth the legal standard for determining whether a  
9 habeas corpus petitioner is entitled to an equitable tolling of the statute of  
10 limitations. A petitioner is only entitled to equitable tolling "if extraordinary  
11 circumstances beyond a prisoner's control make it impossible to file a petition on  
12 time." Stillman v. LaMarque, 319 F.3d 1199, 1202 (9th Cir. 2003) (citing Miles v.  
13 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999)). Generally, a party seeking equitable  
14 tolling bears the burden of establishing that (1) he has been pursuing his rights  
15 diligently, and (2) some extraordinary circumstance stood in his way. Pace v.  
16 DiGuglielmo, 544 U.S. 408, 418 (2005) (citing Irwin v. Dept. of Veterans Affairs,  
17 498 U.S. 89, 96 (1990)). A petitioner bears the burden of showing that  
18 "extraordinary circumstances," rather than his lack of diligence, were the cause of  
19 any untimeliness. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003). A  
20 petitioner must also show a causal connection between the grounds upon which he  
21 asserts a right to equitable tolling and his inability to file a timely federal habeas  
22 petition. Gaston v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005).

23 The R & R addresses and correctly rejects each of Lopez's arguments in favor  
24 of equitable tolling. [Doc. No. 16, R & R at 13-17.] In his Objection, Lopez  
25 contends that equitable tolling is justified due to the language barrier resulting from  
26 his lack of English language abilities and low intelligence quotient. [Doc. No. 17,  
27 Objection at 1-2.] In support of this argument, Lopez includes results from  
28 examinations completed while in state custody. [Doc. No. 17, Ex. A at 4-7.]

1 Controlling authority provides that “a non-English-speaking petitioner  
2 seeking equitable tolling must, at a minimum, demonstrate that during the running  
3 of the AEDPA time limitation, he was unable, despite diligent efforts, to procure  
4 either legal materials in his own language or translation assistance from an inmate,  
5 library personnel, or other source.” Mendoza v. Carey, 449 F.3d 1065, 1070 (9th  
6 Cir. 2006). In Mendoza, the court held that equitable tolling potentially applied  
7 where a Spanish-speaking inmate alleged that he “[1] lacks English language  
8 ability, [2] was denied access to Spanish-language legal materials, and [3] could not  
9 procure the assistance of a translator during the running of the AEDPA limitations  
10 period.” [Id. at 1071.] While recognizing that these allegations could establish the  
11 requisite extraordinary circumstances, the Court remanded for further review of  
12 whether the inmate “exercised the requisite diligence in his search for  
13 Spanish-language materials or a willing translator.” [Id. at 1071 n.6.]

14 Here, unlike Mendoza, while Lopez alleges that he only speaks Spanish and  
15 lacks English language proficiency [Doc. No. 17, Objection at 1-2], he does not  
16 allege that, during the running of the statutory period, Spanish-language legal  
17 materials were inaccessible or that he could not procure translation assistance. Even  
18 taking Lopez’s self-proclaimed low intelligence quotient into account, there is no  
19 indication that he was unable to procure such materials or assistance. Thus, Lopez’s  
20 argument for equitable tolling due to a language barrier fails to establish  
21 extraordinary circumstances and is therefore unpersuasive.<sup>4</sup> Because Lopez fails to  
22 establish extraordinary circumstances, the Court need not address the issue of  
23 Lopez’s diligence. Accordingly, the Court rejects Lopez’s Objection and **ADOPTS**  
24 the R & R’s recommendation that Lopez is not entitled to equitable tolling.

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26 <sup>4</sup> Lopez also cites People v. Garcia, 63 Cal. 2d 265 (1965). Even if the Court  
27 were to consider this California state court decision, the facts in Lopez’s case are  
28 readily distinguishable. Despite the common language barrier issue, Lopez does not  
allege any of the additional factors present contributing to Garcia’s inability to timely  
file such as transfer between prisons or solitary confinement. Id. at 299.

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## II. Certificate of Appealability


A petitioner complaining of detention arising from state court proceedings must obtain a certificate of appealability to file an appeal of the final order in a federal habeas proceeding. 28 U.S.C. § 2253(c)(1)(A) (2007). The district court may issue a certificate of appealability if the petitioner “has made a substantial showing of the denial of a constitutional right.” Id. § 2253(c)(2). To make a “substantial showing,” the petitioner must “demonstrat[e] that ‘reasonable jurists would find the district court’s assessment of the constitutional claims debatable[.]’” Beaty v. Stewart, 303 F.3d 975, 984 (9th Cir. 2002) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Here, because Lopez has not made a “substantial showing,” the Court **DENIES** a certificate of appealability with respect to all of Lopez’s claims.

### CONCLUSION

Based on the foregoing, the Court **ADOPTS IN FULL** Magistrate Judge Brooks’s well-reasoned Report and Recommendation and **GRANTS** Respondent’s motion to dismiss. The Petition is **DISMISSED WITH PREJUDICE**. The Court **DENIES** a certificate of appealability.

**IT IS SO ORDERED.**

**DATED:** August 16, 2013

  
**IRMA E. GONZALEZ**  
United States District Judge